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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF FLORIDA,

Petitioner,

vs.

CLARK A. CAPLAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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December 9, 1988

QUESTIONS PRESENTED FOR REVIEW

I.

DOES THE PLAIN VIEW OBSERVATION OF TWO BURNT HAND-ROLLED CIGARETTE ENDS BY A POLICE OFFICER EXPERIENCED IN NARCOTICS DETECTION WHO BELIEVES THEY CONTAIN CANNABIS, SUPPLY SUFFICIENT PROBABLE CAUSE UNDER THE FOURTH AMENDMENT TO PERMIT THEIR WARRANTLESS SEIZURE?

II.

DOES THE REQUEST BY THE OPERATOR OF A DISABLED VEHICLE TO A POLICE OFFICER TO CALL A TOWING SERVICE, AND THE OPERATOR'S SUBSEQUENT DEPARTURE FROM THE SCENE, PERMIT THE POLICE TO CONDUCT AN INVENTORY SEARCH OF THE VEHICLE PRIOR TO ITS REMOVAL BY THE TOWING COMPANY?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF FLORIDA,
Petitioner,

v.

CLARK A. CAPLAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, the State of Florida, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida, entered August 18, 1988, rehearing denied October 10, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 531 So.2d 88, and is reprinted in the Appendix (A2-A17).

The opinion of the District Court of Appeal of Florida, Fourth District, is reported at 515 So.2d 1362 and reprinted in the appendix. (A18-A42). This opinion was entered on rehearing; the original opinion is not reported but is reprinted in the appendix. (A43-A57).

The trial court's order denying the motion of Respondent Clark A. Caplan ("Caplan") to suppress evidence is not reported. It is reprinted in the Appendix. (A58-A60).

JURISDICTION

The opinion of the Supreme Court of Florida was filed August 18, 1988, and rehearing was denied October 10, 1988.

This Court has jurisdiction. 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States

Constitution, provides, in pertient part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, Section 1, United States

Constitution provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section 12, Florida

Constitution, provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the

nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

On September 26, 1985, at 12:45 p.m., Officer Marvin A. Roberts was exiting from the Hollywood, Florida, police station when he noticed there had been a collision involving two vehicles right in front of the police department. (R. 5-6). He approached Caplan, who was the driver of one of the vehicles involved, and asked to see his license and registration. (R. 7-8). As the car had been rendered inoperable by the collision, Caplan asked Officer Roberts to call to have it towed. (R. 8). Officer Roberts explained the city uses a rotation wrecker service and he would call the company, Mac's Towing, which is a private company, but under contract to the city. (R. 8; 23-24). Caplan agreed to this procedure and advised

Officer Roberts he was going to go make a telephone call for someone to come pick him up. (R. 8).

Officer Roberts then began to fill out an inventory slip, as this is standard procedure when the police call a towing company. (R. 9-11). There is a place on the inventory slip to fill in the Vehicle Identification Number (VIN), so Officer Roberts looked from a position outside the car into the windshield area for the VIN number. (R. 11). As he did, he noticed two burnt hand-rolled cigarette ends in plain view on the front floorboard. (R. 11). He had seized such items hundreds of times in the past, and the crime lab had tested them positive for marijuana. (R. 12). Officer Roberts, believing the items were cannabis, opened the car

door and immediately smelled the odor of marijuana. (R. 13). A search of the car revealed cocaine and marijuana in the glove compartment, and bags of marijuana in the back seat. (R. 14). Officer Roberts then directed another officer to go in to the police station lobby where Caplan was using the telephone and arrest him. (R. 16).

Caplan was charged by information with two felonies, possession of cocaine and possession of cannabis in excess of twenty grams. (R. 68). §§ 893.03(2)(a)(4), 893.03(1)(c) and 893.13 (1) (e), Fla. Stats. (1985). Through counsel, he filed a motion to suppress the contraband, which was seized from his vehicle, on the ground that the warrantless search by which it was obtained was unlawful under the Fourth Amendment. (R. 70-73).

The trial court conducted an evidentiary hearing on the motion to suppress. The State's witness, Officer Marvin A. Roberts, testified he had more than ten years' experience, six as an undercover officer in narcotics. (R. 4). He had attended the Drug Enforcement Administration's school of drug enforcement and drug identification. (R. 4). In the course of his police work, he had made hundreds of arrests involving cocaine and marijuana. (R. 5). He testified to the events of September 26, 1985, recited above.

The trial court denied the motion to suppress on two bases: (1) that the evidence was obtained pursuant to a valid inventory search and/or (2) the officer's plain view observation of the burnt cigarette ends was

sufficient probable cause to search the car. (R. 78-79; A58-A60). Caplan then entered a plea of nolo contendre to both counts of the information, reserving his right to appeal the trial court's ruling on the motion to suppress. (R. 52).

On appeal, the intermediate appellate court affirmed. It held first, "taking into consideration the totality of the circumstances, and the training and experience of the officer, there was sufficient cause to support his conclusion that the vehicle contained contraband." (A. 22). Alternatively, the District Court of Appeal concluded that even if the view of the marijuana cigarette butts was not sufficient cause to search, "the intrusion for the purpose of taking an inventory was permissible

in any event". (A. 23).

The Florida Supreme Court granted Caplan's petition for review, and reversed. The court held the observation of hand rolled cigarettes, even by a trained police officer, will not alone create probable cause in the absence of additional facts. In so holding, the court stated its conclusion is "in harmony with the trend apparently followed in many American jurisdictions", although it acknowledged a split of authority. (A11-A12). The court found the inventory search doctrine inapplicable because it concluded the search was not an inventory search; Caplan's request for police assistance in calling the towing service was not surrender of the vehicle, nor was the car impounded or otherwise placed in

police control. (A8).

The State seeks to invoke this Court's jurisdiction to review the Florida Supreme Court's application of the Fourth Amendment in this case in a manner which conflicts with case law from other jurisdictions as well as prior decisions of this Court.

REASONS FOR GRANTING THE WRIT

I.

THE FLORIDA SUPREME COURT'S DECISION THAT THE PLAIN VIEW OBSERVATION OF TWO HAND-ROLLED CIGARETTE ENDS BY A POLICE OFFICER EXPERIENCED IN NARCOTICS DETECTION WHO BELIEVED THEY CONTAINED CANNABIS, DID NOT CONSTITUTE PROBABLE CAUSE TO JUSTIFY THEIR WARRANTLESS SEIZURE, CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER JURISDICTIONS.

The State maintains the plain view observation of burnt hand-rolled cigarette ends by a police officer trained in narcotics detection established probable cause to justify their seizure and the resulting search of Caplan's vehicle.[1] Florida's position is supported by this

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[1] Once probable cause is established, the police can legitimately search a stopped car without a warrant. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

Court's decision in Texas v. Brown, 460 U.S. 730 103 S. Ct. 1535, 75 L.Ed.2d 502 (1983). Brown held that an officer's observation of an opaque container -- a green balloon -- which he believed, based on his experience, he believed contained narcotics, supplied probable cause for its seizure.

The plain view doctrine consists of three parts: (1) the law enforcement officer must lawfully make an initial intrusion or otherwise properly be in a position from which he can view a particular area, (2) the discovery of evidence in plain view must be inadvertent, and (3) it must be immediately apparent to the officer that there is evidence of criminal activity. Texas v. Brown, supra; Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

In the present case, the first two

elements are undisputed. Officer Roberts observed the cigarette ends on the car's floorboard from his position outside the car on the public street and he noticed them as he was checking the vehicle's VIN number.

It is the third element on which the courts below divided: whether the observation of the burnt cigarette ends which the officer believed contained marijuana, constituted probable cause that the items were contraband, thus making criminal activity "immediately apparent." Both the trial and intermediate appellate courts found probable cause arose from the foregoing facts, but the Florida Supreme Court held "the mere observation of an opaque container, without more, cannot constitute probable cause." (A14). This result is in direct conflict with Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75

L.Ed.2d 502 (1983), wherein it was held the observation of an opaque container did supply probable cause when the arresting officer testified that in his experience, balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. As in Brown, Officer Roberts' observation of the burnt cigarette ends, coupled with his belief they were contraband, based on his training and experience, was sufficient probable cause.

"Probable cause" is designed as a flexible concept, to be interpreted using common sense. It simply requires that the facts known to the officer would warrant a reasonable person in the belief that certain items may be contraband. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Probable cause, not

absolute certainty, is all that is required in making a seizure under the plain view doctrine. Arizona v. Hicks, 480 U.S. 321, 325-326, 107 S.Ct. 1149, 1153-1154, 94 L.Ed.2d 347, 354-355 (1987). The Florida Supreme Court's decision in effect requires absolute certainty, which is more stringent than the probable cause dictate of the Fourth Amendment. Since the State Constitution requires that the Florida Supreme Court act in conformity with this Court's construction of the Fourth Amendment,[2] the ruling below does not rest on independent state grounds, but upon a misapprehension and misapplication of Federal Constitutional law.

In addition to the conflict between the

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[2] Art. I, § 12, Fla. Const.; State v. Lavazzoli, 434 So.2d 321, 323-324 (Fla. 1983).

decision below and the controlling authority from this Court discussed above, there is a split of authority nationally as to whether an officer's observation of hand-rolled cigarettes, standing alone, constitutes probable cause to believe they contain contraband. This was noted in the Florida Supreme Court's decision. (A12).

In United States v. Bravo, 403 F.Supp. 297, 302 (S.D. N.Y. 1975), which is factually on point, a federal district court held that where two experienced police officers observed hand-rolled cigarette butts which they believed were marijuana, it would accept their judgment and find sufficient probable cause to arrest.

The Alabama Supreme Court, in State v. Calhoun, 502 So.2d 808 (Ala. 1986), likewise held that when an officer observed two hand-rolled cigarettes in the

defendant's shirt pocket, and he was familiar with the appearance and use of marijuana, he had probable cause to believe the cigarettes were marijuana so the resulting arrest and seizure were lawful. The Court in Calhoun based its decision on Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

Several state intermediate appellate courts considering this issue have also found probable cause on substantially the same facts. See, Johnson v. State, 720 S.W. 2d 239 (Tex. App. 1986); Commonwealth v. Skea, 18 Mass. App. 685, 470 N.E. 2d 385 (1984); State v. Kennedy, 38 Wash. App. 41, 684 P.2d 1326 (1984), aff'd, other grounds, State v. Kennedy, 107 Wash. 2d 1, 726 P.2d 445 (1986); State v. Marchand, 37 Wash. App. 741, 684 P.2d 1306 (1984) rev'd, other grounds, 104 Wash. 2d 434, 706 P. 2d 225 (1985); State v. Knowles, 438 So.2d 648

(La. App. 2d Cir.), writ denied 442 So.2d 458 (La. 1983).

On the other hand, as the Florida Supreme Court's opinion states, some jurisdictions have found the plain view observation by police of hand-rolled cigarettes, without additional factors, does not constitute probable cause to believe they are contraband.[3] With respect to the decisions cited in the Florida Supreme Court's opinion, the State would point out that all but one pre-date the 1983 decision in Texas v. Brown, 460 U.S.

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[3] The earlier Florida case on this point cited in the decision below (A 10), Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978), is factually distinct from Texas v. Brown because in Carr there was no basis stated for the officer's belief. In the present case, as in Texas v. Brown, the officer testified as to his experience in narcotics detection and the fact that similar items in the past had been determined to be marijuana. (R. 12).

730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). (See, cases cited at A12). In the remaining decision, State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983), the Court chose not to follow Texas v. Brown, and found greater protections available to citizens of New Hampshire under its constitution. As the State has pointed out, the Florida Supreme Court had no similar license, for under the Florida Constitution it is obligated to follow Texas v. Brown and other decisions of this Court which construe the Fourth Amendment. However, it is true that there is a division of authority on the issue, which makes it appropriate for certiorari review.

Finally, this Court has recognized that Florida in particular has a serious problem with illegal drug activity. Florida v. Royer, 460 U.S. 491, 508; 103 S.Ct. 1319,

1329; 75 L.Ed.2d 229, 243 (1983) (Powell, J., concurring); United States v. Mendenhall, 446 U.S. 544, 561-562; 100 S.Ct. 1870, 1881-1882; 64 L.Ed.2d 497, 514 (1980) (Powell, J. concurring). To hold that because a hand-rolled cigarette could possibly contain tobacco, its seizure by a trained officer who in hundreds of cases had found such an item to contain contraband, was without probable cause, is to ignore reality.

In sum, the jurisdictional considerations of Rule 17, Supreme Court Rules, are satisfied. There is a clear conflict of decisions between the decision sought to be reviewed and decisions of this Court as well as other jurisdictions. A Fourth Amendment claim is involved. The question presented is of general significance and

will undoubtedly recur. Accordingly, the State respectfully requests that Certiorari be granted.

II.

THE FLORIDA SUPREME COURT'S DECISION THAT THE REQUEST BY THE OPERATOR OF A DISABLED VEHICLE TO A POLICE OFFICER TO CALL A TOWING SERVICE, AND THE OPERATOR'S SUBSEQUENT DEPARTURE FROM THE SCENE, DID NOT PERMIT THE OFFICER TO CONDUCT AN INVENTORY SEARCH OF THE VEHICLE PRIOR TO ITS REMOVAL BY THE TOWING COMPANY, CONFLICTS WITH THE INVENTORY SEARCH DECISIONS OF OTHER JURISDICTIONS.

This Court has approved the inventory search exception to the Fourth Amendment's warrant requirement to validate searches of automobiles that are taken into police custody. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The purposes of an inventory search are to protect the owner's property, to protect the police from claims that property has been stolen, and to protect the police and public from physical harm from any dangerous contents. Id., 469 U.S. at 369; 96 S.Ct. at 3097, 49 L.Ed.2d

at 1005.

In the present case, both the trial and intermediate appellate courts found the inventory search doctrine applicable. Their findings are supported by the record. Officer Roberts testified that once he assumed the responsibility, at Caplan's request, of arranging for the towing of the vehicle, he acted in accordance with standard police procedures and commenced filling out a tow slip inventory form which the tow truck driver was to sign. (R. 9, 33). The purpose of conducting the inventory was to be sure nothing would be stolen from the car after it was towed. (R. 10).

In that regard, the trial court stated that because the towing company was coming at the request of the police and not independently, the police had the right to make an inventory because if anything was

missing later, "you can rest assured that the police department would have been sued." (R. 45-46).

The Florida Supreme Court acknowledged the validity of the inventory search doctrine generally but refused to apply it to the facts of this case. The court concluded that Caplan's request to call the towing service did not transfer custody of the vehicle to the police, so they had no right to inventory its contents. The State maintains Caplan's request that a tow truck be called and his departure from the scene, amounted to a transfer of at least temporary custody to the police. In Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), this Court held that the reasons for conducting an inventory search are the same even if a vehicle is to be towed to a private lot; "the police may still wish to protect

themselves or the owners of the lot against false claims of theft or dangerous instrumentalities." Id., 479 U.S. at 373; 107 S.Ct. at 742; 93 L.Ed.2d at 747. Officer Roberts assumed responsibility for the car. Thereby, he assumed custody, thus giving rise to the basis for a valid inventory search in accordance with standard police procedure. By failing to follow the controlling authority of Opperman and Bertine, the Florida Supreme Court has decided a federal question in a manner that conflicts with those decisions.

The decision below is also in direct conflict with the decision of the Virginia Supreme Court in Giradi v. Commonwealth, 221 Va. 459, 270 S.E. 2d 743 (Va. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981). In Giradi, a police officer decided to call a towing company to remove a car that was improperly parked in

the fire lane of a high rise apartment complex. The court held that although the vehicle was to be towed by a private company to its private lot, and it had not been actually impounded by the police, there was still good reason to conduct an inventory search before the police relinquished even temporary custody of the car. The court reasoned that the rationale underlying the inventory search doctrine (protection of property, prevention of claims, and protection from any potentially dangerous contents) still applied to this situation. The Florida Supreme Court's attempt to draw a distinction between police impoundment and the facts here where the police clearly had at least temporary custody of the car, directly conflicts with the Giradi decision.

The issue herein thus presents a clear conflict between the decision below and the

principles governing the necessity of and justification for inventory searches discussed in Colorado v. Bertine, supra, and South Dakota v. Opperman, supra, as well as the decision of the Virginia Supreme Court in Giradi v. Commonwealth, supra. See, Sup. Ct. R. 17. If permitted to stand, the Florida Supreme Court's ruling will adversely affect law enforcement officers who routinely conduct inventory searches of automobiles entrusted to their care. The State asks this Court to grant certiorari so as to resolve the conflict and to correct the erroneous restriction on inventory searches imposed by the Florida Supreme Court.

CONCLUSION

Both of the Fourth Amendment issues presented in this petition are substantial federal questions. Based on the foregoing reasons and authorities, the Petitioner, the State of Florida, respectfully requests that this Court grant its Petition for Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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December 9, 1988

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CLARK A. CAPLAN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 71,709

Supreme Court of Florida

Oct. 10, 1988

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for respondent, and reply thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

CLARK A. CAPLAN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 71,709

Supreme Court of Florida

Aug. 18, 1988

BARKETT, J.

We have for review Caplan v. State, 515 So.2d 1362 (Fla. 4th DCA 1987), because of conflict with Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978). We have jurisdiction. Art. V, §3(b)(3), Fla. Const. We quash the opinion below.

The questions presented this case are (1) whether the police are entitled to conduct an inventory search of a car disabled in a busy intersection when the owner requests assistance in obtaining a towing service, and (2) under what circumstances the observation of hand-

rolled cigarette papers inside such a car creates probable cause.

Petitioner was involved in an automobile accident in front of the Hollywood, Florida, police department. An officer from the station approached the scene and, after determining that no one was injured, proceeded to check the petitioner's license and registration. Because petitioner's car was disabled in the middle of a busy intersection, petitioner asked the officer for the name of a towing service. The officer suggested one of the wrecker services used by the police department and agreed to call it while petitioner used the telephone in the police station to obtain other transportation.

During the time petitioner was inside the police station, the officer began filling out an accident tow slip for the

tow driver. When he looked into the front windshield of the car for the vehicle identification number, he observed what he described as "several small rolled burnt cigarette wrappings" on the floorboard. The officer concluded that these were marijuana cigarettes, opened the door and discovered baggies of marijuana and cocaine. Petitioner was then arrested and charged with two counts of possession of narcotics.

Petitioner's motion to suppress the evidence was denied by the trial court. On appeal, the Fourth District Court affirmed on two alternative bases: that the police had probable cause to conduct the search, and that the contraband was discovered pursuant to a legal inventory search. We cannot agree that this record supports the district court's conclusion on either basis.

An inventory search, unlike all other theories under which an automobile may be searched, has no connection with any criminal investigation. It occurs as part of the routine administrative process when an automobile is legitimately placed in police custody. It has a caretaking function and is conducted in order to list the items left in the car to protect the owner's property, protect the police against claims or disputes over lost or stolen property, and to protect the police from potential danger. South Dakota v. Opperman, 428 U.S. 364 (1976). Inventory searches are not conducted to discover evidence of a crime or prevent wrong-doing. Thus, concerns pertaining to probable cause or warrant requirements are not implicated. The scope of the search is restricted by the boundaries of established police procedure, which curtails arbitrary

police intrusion. Id. at 383 (Powell, J., concurring).

Although an inventory search does not contemplate a criminal investigation, officers are not required to look the other way if the inventory reveals contraband. Because it is a lawful search, anything found within the legitimate confines of the search may be used as evidence. Illinois v. Andreas, 463 U.S. 765 (1983); Texas v. Brown, 460 U.S. 730 (1983); Coolidge v. New Hampshire, 430 U.S. 443 (1971). Thus, an inventory search while not made pursuant to a criminal investigation may become one if evidence of a crime is discovered during the taking of the inventory.

On the other hand, an inventory search cannot be used as a mere pretext or subterfuge for a criminal investigation. It cannot substitute for probable cause where none exists. As this Court said in

Miller v. State, 403 So.2d 1307, 1312 (Fla. 1981):

> [T]he police must act in good faith and not use the inventory search as a subterfuge to conduct a warrantless search for incriminating evidence.

See U.S. v. Prescott, 599 F.2d 103 (5th Cir. 1979). See also Colorado v. Bertine, 107 S.Ct. 738, 741 (1987) (discussing cases holding an inventory search invalid because they "concerned searches solely for the purpose of investigating criminal conduct").

Thus, a purported inventory search must be examined in light of its purpose. Central to its purpose is the necessity of having the automobile in legitimate police custody. Obviously, there is no need to perform the caretaking function of an inventory when the vehicle is not in the care, custody, and control of the police.

In the present case, the evidence indicates that petitioner had not transferred custody of his wrecked vehicle to the police officer. Merely asking for police assistance in calling a towing service does not constitute surrender of a vehicle. Nor was petitioner's car impounded or otherwise placed in police control. Indeed, the officer's own testimony indicated that his reason for searching the vehicle was his belief that he had probable cause.

Thus, since the search in question was not an inventory search, the sole question is whether the hand-rolled cigarette papers observed by the officer provided probable cause for the search. We conclude that

they did not.[1]

There is a general consensus among the courts of various jurisdictions that the mere observation of opaque containers, such as the hand-rolled cigarette papers in this instance, will not create probable cause in the absence of other facts. We ourselves have so held in P.L.R. v. State, 455 So.2d 363 (Fla. 1984), cert. denied, 469 U.S. 1220 (1985), which we find to be dispositive of the issue presented here.

In P.L.R., this Court had the

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[1] The state argues that the search was permissible because the cigarette papers were in plain view. The state misperceives the plain view doctrine. No one suggests that the papers were not in plain view. The issue, however, is not merely that something can be seen, but that what is seen creates a suspicion that rises to the level of probable cause. See Coolidge v. New Hampshire, 403 U.S. 443 91971). Under the theory suggested by the state, police agents would be entitled to seize anything merely because it happens to be in view.

opportunity to discuss the case of Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978), which is identical to the case before us today. In Carr, the Second District had held that the mere observation of two hand-rolled cigarettes in an automobile does not in and of itself give rise to probable cause to search that automobile. Id. at 959. See Thompson v. State, 405 So.2d 501 (Fla. 2d DCA 1981); Harris v. State, 352 So.2d 1269 (Fla. 2d DCA 1977).

This Court in P.L.R. specifically declined to reject or disapprove the analysis in Carr. On the contrary, we distinguished Carr, Thompson and Harris from several other cases holding that the observation of opaque containers such as hand-rolled cigarettes, combined with other additional factors, created probable

cause.[2] See Adams v. State, 375 So.2d 638 (Fla. 1st DCA 1979), cert. denied, 385 So.2d 754 (1980); Lachs v. State, 366 So.2d 1223 (Fla. 4th DCA 1979); Tamburro v. State, 343 So.2d 638 (Fla. 4th DCA 1977).

This conclusion is in harmony with the trend apparently followed in many American jurisdictions. Our nation's courts generally have found that the mere observation of hand-rolled cigarettes, which may nor may not contain contraband, is not enough to create probable cause without some other element being present.

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[2] Such other factors could include, but is not necessarily limited to, the three factors suggested in P.L.R. v. State, 455 So.2d 363 (Fla. 1984), cert. denied, 469 U.S. 1220 (1985): the container (1) is of a type commonly used to hold narcotics, (2) is at a known narcotics transaction site, and (3) is determined to be narcotics-related based on the observations of police officers with sufficient experience and expertise in such matters.

E.g., United States v. Anderson, 401 F. Supp. 996 (E.D. Tenn. 1975); Thomas v. Superior Court for County of San Joaquin, 22 Cal.App.3d 972, 99 Cal.Rptr. 647 (1972); People v. Wright, 80 Ill.App.3d 927, 400 N.E.2d 731 (1980); People v. Barker, 72 Ill.App.3d 466, 391 N.E.2d 214 (1979); State v. Ball, 124 N.H. 226, 471 A.2d 347 (1983). But see State v. Knowles, 438 So.2d 648 (La.App.), writ denied, 442 So.2d (1983); Commonwealth v. Skea, 18 Mass.App. 685, 470 N.E.2d 385 (1984).

This rule is consistent with the results reached in similar cases involving other containers that could have held either innocent or illegal contents, where nothing indicated the latter. E.g., People v. Huntsman, 152 Cal.App.3d 1073, 200 Cal. Rptr. 89 (1984) (plastic bag); People v. Norman, 14 Cal.3d 929, 123 Cal. Rptr. 109, 538 P.2d 237 (D.C. App. 1974) (prescription

bottle); Commonwealth v. Phillips 225 Pa.Super. 126, 310 A.2d 290 (1973) (ornamental smoking pipe).

Courts usually have found that hand-rolled cigarettes created probable cause only where other elements were present to justify the officer's suspicions, such as furtive acts by the accused, the presence of drug paraphernalia or the odor of marijuana prior to the search. E.g., State v. Bainch, 24 Ariz.App. 140, 536 P.2d 709 (1975) (police observed hand-rolled cigarettes together with commercial cigarettes, and had expertise to conclude the former were contraband); People v. Stanfill, 170 Cal.App.3d 420, 216 Cal. Rptr. 472 (1985) (accused was in place where drug deals frequently occurred and sold two hand-rolled cigarettes for at least one dollar); People v. Poole, 48 Cal.App.3d 881, 122 Cal.Rptr. 87 (1975)

(officer observed very irregular hand-rolled cigarette behind accused's ear and had special expertise to recognize it as contraband); People v. Walls, 34 Cal. App.3d 94, 109 Cal.Rptr.708 (1973) (police observed hand-rolled cigarette butts together with drug paraphernalia); United States v. McCarthy, 448 A.2d 267 (D.C. App.1982) (accused was seen sorting through ashtray and fled when officer identified himself, and arrest occurred at known site of narcotics transactions).

The rule deducible from these cases, which we expressed in P.L.R., is that the mere observation of an opaque container, without more, cannot constitute probable cause. There must be at least an additional objective and reasonably specific element justifying the state agent's inference of wrong doing. Under a probable cause standard, that is, the officer at the

scene must be able to explain to an objective magistrate or judge "just how it is possible to distinguish such a [marijuana] cigarette from other hand-rolled cigarettes." 1 LaFave, Search & Seizure: A Treatise on the Fourth Amendment 573 (1987).

In this instance, the police officer testified that he did not know what was contained within the partially burned cigarette papers he observed through the windshield of petitioner's car. He conceded that it could have been tobacco, or even nothing at all. The location of these cigarette papers was not at a known narcotics transaction area. Even if we assume this officer had special expertise to recognize illegal narcotics, this case more closely resembles the line of authority holding that the mere observance of an opaque container commonly used to

transport contraband does not, without more, give rise to probable cause to search.

Thus, once the officer opened the car door, petitioner's expectation of privacy was violated and a search occurred. This search was without warrant, nor was it supported by probable cause under the plain view doctrine. Therefore, under Wong Sun v. United States, 371 U.S. 471 (1963), all evidence seized subsequent to that search must be suppressed as fruit of the poisonous tree.

We quash the opinion below and remand for proceedings consistent with the views expressed above.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Fourth District - Case No. 4-86-0501

Law Offices of Lane S. Abraham, P.A. and Law Offices of Carl H. Lida, P.A., Miami, Florida,

for Petitioner

Robert A. Butterworth, Attorney General and Carolyn V. McCann and Alfonso M. Saldana, Assistant Attorneys General, West Palm Beach, Florida

for Respondent

CLARK A. CAPLAN,
Appellant,

V.

STATE OF FLORIDA,

Appellee.

No. 4-86-0501

In the District Court of Appeal
of the State of Florida
Fourth District

Dec. 2, 1987

Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge.

Lane S. Abraham, and Carl H. Lida of Law Offices of Carl H. Lida, P.A., Miami, for appellant.

Robert A. Butterworth, Jr., Attorney General, Tallahassee, Lee A. Rosenthal, Robert L. Teitler and Carolyn V. McCann, Assistant Attorneys General, and Donna R. Slebodnick, Legal Intern, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

STONE, J.

We grant appellant's motion for

rehearing, vacate the prior opinion filed July 1, 1987, and substitute the following revised opinion.

The defendant entered a plea of nolo contendere to charges of possession of cocaine and cannabis, reserving the right to appeal the denial of a motion to suppress. We affirm.

The defendant was involved in an automobile accident in front of a police station. The investigating officer first ascertained that there were no injuries, and examined defendant's license and registration. The registration was not in the defendant's name. The vehicle was blocking an intersection and could not be driven. There was evidence that the defendant asked the officer if the officer could have the vehicle towed, and was told of the availability of the city's contract wrecker service. The defendant told the

officer to call that service. After doing so, the officer proceeded, in accordance with routine department requirements, to fill out a tow slip on department forms. The officer checked the automobile VIN number, which could be seen through the windshield. As appellant was not the registered owner, this was standard procedure. The department's procedure, when a vehicle was being towed after an accident by a city contract wrecker service, also required that an inventory of the contents of the car be made as part of the documentation.

While checking the VIN number, the officer noticed, through the window, what appeared to be marijuana "joints," (hand-rolled marijuana cigarettes), on the floor board. The defendant was not present, having left the scene to use a telephone. The officer had had extensive training and

experience in drug identification. The officer opened the car door and smelled marijuana smoke. A search of the vehicle uncovered cocaine as well as marijuana. The officer testified that after seeing the cigarette butts he considered that he was conducting a criminal investigation as well as continuing the accident investigation. It is apparent from the record, and the court's decision, that the trial judge accepted the evidence to be that the butts had the appearance of hand-rolled, partially smoked marijuana cigarettes. Counsel for the defendant did not argue below that the butts did not have the appearance of marijuana, but maintained that they also had the appearance of hand-rolled legal cigarettes. The office acknowledged that the cigarettes' appearance was consistent with either portrayal.

There are two bases justifying this search and seizure. First, taking into consideration the totality of the circumstances, and the training and experience of the officer, there was sufficient cause to support his conclusion that the vehicle contained contraband. See P.L.R. v. State, 455 So.2d 262 (Fla. 1984), cert. denied, 469 U.S. 1220 105 S.Ct. 1206, 84 L.Ed.2d 349 (1985); Albo v. State, 379 So.2d 648 (Fla. 1980); State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981); State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978); Tamburro v. State, 343 So.2d 638 (Fla. 4th DCA 1977); Baggett v. State, 494 So.2d 221 (Fla. 1st DCA 1986); State v. Nobles, 477 So.2d 32 (Fla. 1st DCA 1985), case dismissed, 492 So.2d 1334 (Fla. 1986); State v. Spence, 448 So.2d 599 (Fla. 2d DCA 1984); Adams v. State, 375 So.2d 638 (Fla. 1st DCA 1979), cert. denied, 385 So.2d 754

(Fla. 1980); State v. Redding, 362 So.2d 170 (Fla. 2d DCA 1978). The right to search in this case is even further reinforced by the fact that the vehicle was about to be removed by the tow truck. See Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). We do not consider Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978), to be controlling. See also Ensor v. State, 403 So.2d 349 (Fla. 1981).

Second, even had there not been sufficient cause to conduct the search after viewing the marijuana joints, the intrusion for the purpose of taking an inventory was permissible in any event. The defendant requested the police to call a truck to tow his car from the scene of the accident, and the towing was conducted in accordance with standard police procedures. Under these circumstances, allowing access to the car for the purpose

of the taking of an inventory to identify radios, tape players, and other valuables, is reasonable. See Colorado v. Bertine, ___ U.S. ___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); United States v. Scott, 665 F.2d 874 (9th Cir. 1981); United States v. Prescott, 599 F.2d 103 (5th Cir. 1979); United States v. Edwards, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); In Re One 1965 Econoline, I.D. No. E16JH702043, Arizona License No. EC-7887, 109 Ariz. 433, 511 P.2d 168 (Ariz. 1973); Miller v. State, 403 So.2d 1307 (Fla. 1981).

We also note that, although the officer did not open the door for the purpose of inspecting the VIN number, such a purpose would have been proper as well, as the car had been in an accident, was about to be

towed, and the driver was not the registered owner. Entry for similar purposes has not been considered to be restricted by the Fourth Amendment. See New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); State v. Ramer, 501 So.2d 52 (Fla. 4th DCA 1987); State v. Eaton, 498 So.2d 1066 (Fla. 4th DCA 1986).

DELL, J., concurs.

GLICKSTEIN, J., dissents with opinion.

GLICKSTEIN, J., dissenting.

I have changed some of the text of my original dissent because of changes in the majority opinion.

Because I perceive critical facts differently from the majority, my conclusions, which are as follows, are also different.

I

The trial court erred in holding under the plain view doctrine there was probable cause to search the vehicle.

The majority says: "While checking the VIN number, the Officer noticed, through the window, what appeared to be marijuana "joints," (hand-rolled marijuana cigarettes), on the floor board."

The transcript reflects the following:

> Q While you were standing outside the vehicle looking in the VIN plate area, what, if anything, did you observe inside the vehicle?
>
> A When I looked in the vehicle on the floorboard, it appeared to be marijuana joints.
>
> MR. LIDA: I object to what appeared to be marijuana joints. He asked him to just describe what he saw. It is a conclusion.
>
> THE COURT: I will sustain the objection.
>
> If you can reach that

conclusion -- You can give that conclusion, but you have to state the basis for reaching it, so that is your conclusion and we are doing it in reverse.

That is your opinion and he is entitled to give a lay opinion as to what it is but he has to tell us what his basis is for reaching that opinion.

Q [By Mr. Magrino) What did you see?

A I saw several small rolled burnt cigarette wrappings which in my opinion looked half-smoked.

Q Have you ever seen items like that in the past?

A Yes, several times.

Q By several times --

A I would have to again say hundreds of times.

Q And in the past when you had seen those items, had you ever forwarded those items to the Broward Sheriff's Crime Laboratory and received test reults back on what those items were?

A Yes.

MR. LIDA: When we are talking about items, we are talking about burnt cigarette wrappings. I want the record to be clear that he is referring to those items.

THE COURT; He is talking about not necessarily the contents but the item in the entirety.

MR. LIDA: He referred to burnt cigarette wrappings.

THE COURT; Hand-rolled?

THE WITNESS: Hand-rolled, yes.

Q (By Mr. Magrino) What was the report back in the past that you had gotten from the lab?

MR. LIDA: I object to what the reports were in the past. I don't think it is relevant and unless he asks which cases it was and what we are talking about --

THE COURT: I will overrule the objection. He is attempting to tell us his basis for his opinion.

. . . .

Q While you were on the outside of the car and the car was closed, the doors were closed?

A Yes, it was.

Q You were looking at the VIN number from the driver's side on the windshield on the outside of the car?

A I began looking at the VIN number as well as into the inside of the car.

Q When you looked down on the floor board of the car, you observed what appeared to be a hand-rolled cigarette wrapping that was partially burned?

A. Yes.

Q And you did not know at that time what was in the hand-rolled cigarette wrapping, if anything?

No, I did not.

Q You didn't notice any marijuana residue around the car, you just noticed those wrappings, those cigarette wrappings that were burnt; is that right?

A Yes.

Q You didn't know at that point whether it was a hand-rolled cigarette butt or contraband cigarette butt or if there was anything inside the wrapping?

A I could tell there was substance inside the wrapping. I could not tell exactly what it was.

Q You couldn't see it?

A No.

Q You couldn't see what was in the wrapping?

A No, I could not.

Q So if you couldn't see there was anything in there and it was lying flat on the floor, I assume -- was it on the floorboard of the car?

A Yes.

Q How could you tell whether there was anything inside the wrapping at all if you couldn't see into there?

A Just from the structure and shape, the curvature of the wrapping. You can tell if something is in a cigarette paper or else the cigarette paper would just be lying flat on the floor.

Q It would still be rolled, wouldn't it? Are you familiar with Bugler Rolling Papers or hand rolling papers?

A I am familier [sic] with rolling papers.

Q And you knew they sell cut and loose tobacco?

A Yes.

Q Do you know whether or not you ever have seen anybody roll their own tobacco and smoke their own cigarettes?

A Sure.

Q In your experience, if the ends are tightly rolled, sometimes what is inside can come out and it appears still rolled but what was inside would be out of it?

A I imagine that it's true.

Q So, in this particular case, wouldn't it be fair to say that although you could see the burnt cigarette wrappings, you had no idea of what was inside them or if anything was at all?

A In my opinion, when I look in there, there was something inside.

Q I am not asking you --

MR. MAGRINO: He is trying to answer the question as best he can.

THE COURT: Overruled.

Q (By Mr. Lida) I didn't hear your answer. I am sorry.

You thought there was soemthing inside the cigarette wrapping?

A I could not tell, of course, what was inside.

Q You couldn't see any marijuana seeds on the floorboard of the car?

A No.

Q Now, pursuant to that, I think you told me in deposition and correct me if I am wrong, you thought you had probable cause to go into the car and conduct a further investigation.

A Yes, I did.

Q You never got consent to go into the car?

A No, I did not.

The majority's revised opinion now gives a little more detail about the butts seen

by the officer, but still concludes the search was justified on the basis of the officer's experience and knowledge. I do not see how butts which could be either of hand-rolled tobacco cigarettes or of marijuana cigarettes -- as the officer acknowledged -- can be a lawful basis for an automobile search. "[A]utomobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize." Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), citing Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The basis of such a warrantless search is reasonable cause for the officer's belief that the automobile

contains contraband.

It seems to me that all the officer had here was articulable suspicion, if indeed he had that. I think the majority's language fits the definition of articulable suspicion, not probable cause.

Appellant contends that the information available to Officer Roberts before he conducted his search inside the vehicle did not establish probable cause for him to believe a crime had been committed or was in progress. I agree. A major authority on which he relies is Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978). There the appellant was approached late one evening and questioned, while outside his vehicle, concerning his presence in a certain residential area. He explained why he was there and gave the officer proper identification as requested. The officer then shined his flashlight into the vehicle to

"check the interior," and observed therein two hand-rolled cigarettes. The officer entered the vehicle, seized and examined the cigarettes and determined they appeared to contain marijuana. The officer arrested Carr for misdemeanor possession of marijuana. Then he reached back into the vehicle and searched a folded blanket, finding what appeared to be "two lids of marijuana" and a rolling device. Carr was then arrested for "felony possession and paraphernalia." Id. at 958. The officer together with another then searched the truck further and found additional contraband.

At the hearing on suppression the officer said when he saw the two cigarettes through the window he "knew" they were marijuana because they were unevenly rolled and the ends were twisted. He could not see any marijuana. The appellate court

reversed the trial court's finding that the seizure of the marijuana cigarettes was proper and said that absent a search warrant, the search and seizure had to be within a recognized exception to the warrant requirement, the court finding no applicable exception. The officer had no probable cause to arrest, as the state argued, and could not validly search on that basis. The Carr court quoted the opinion in Dixon v. State, 343 So.2d 1345 (Fla. 2d DCA 1975), for the test to determine probable cause. That test is "whether the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." 353 So.2d at 959, quoting Dixon. The officer's known facts in Carr failed to meet this standard.

The state argued further, in Carr, that the plain view exception applied. The appellate court said it did not, as all that was in plain view were two cigarettes, not contraband. Id. Both the seizure of the cigarettes and subsequent search and seizure were herefore unreasonable and should have been suppressed.

If the sole basis for the search and seizure was the plain view doctrine, I believe it was improper, and pursuant to Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the evidence that resulted should have been suppressed.

II.

The second ground stated by the trial court for denying appellant's motion to suppress -- in fact, when stated orally its primary ground -- was that the search which revealed the presence of contraband was a

proper inventory search. Appellant argues the inventory search could not be proper when there was no impoundment of the vehicle, and, alternatively, if the vehicle was properly impounded, the officer did not advise appellant of reasonable alternatives to impoundment.

The state argues that there was no impoundment nor intention to impound; that the officer made the inventory search primarily for the benefit of appellant; that impoundment is not a necessary condition of such inventory searches; and that since there was no impoundment, there was no need to tell appellant of available alternatives thereto.

The parties pursuant to our request after oral argument, filed supplemental briefs upon the question whether impoundment was a prerequisite to a valid inventory search. That question was not

answered, in my view, by Miller v. State, 403 So.2d 1307 (Fla. 1981).

I would find as follows:

1. There was no official impoundment here; but such was unnecessary if the inventory search was otherwise defensible.

2. There was no right nor duty on the officer's part to conduct an inventory search in this case.

With respect to the first conclusion, in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the court stated that "[i]n applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents." 428 U.S. at 373, 96 S.Ct. at 3099, 49 L.Ed.2d 1007 (emphasis

added). See also State v. Floyd, 120 Ariz. 358, 586 P.2d 203, 206 (Ct. App. 1978); Robertson v. State, 541 S.W.2d 608 (Tex. Ct. App. 1976); United States v. Feldman, 788 F.2d 544, 552 n. 10 (9th Cir. 1986).

However, I believe the "inventory search" in the present case was a violation of Caplan's constitutional right to protection from unreasonable search and seizure. It is true, as the state points out, that appellant gave his authorizaiton and consent to have the vehicle towed by the wrecker that usually tows vehicles for the police. I assume it is also true that the police routinely search vehicles towed under their auspices -- though it may well be this is only because usually the vehicles are also being impounded, and consideration has not been given to a distinction from other circumstances. It may also be inferred tht Caplan requested

the policeman to call for the wrecker because (1) the policeman made clear the tow had to be prompt because the intersection was a busy one, (2) Caplan was rattled because of the accident, and (3) Caplan had no reason to suppose the police would go through the contents of his automobile.

Nevertheless, the officer did not advise appellant of reasonable alternatives to the "impoundment." Appellant merely requested that the officer call a tow truck. Appellant was not arrested nor otherwise unable to make a decision regarding any valuables in the automobile. See, e.g., Altman v. State, 335 So.2d 626, 628-29 (Fla. 2d DCA 1976) (In considering the validity vel non of an inventory search, it becomes essential to determine initially whether it is necessary for police to conduct the search. "A prime

criterion to determine if the police have taken lawful custody of a motor vehicle is whether or not it is justifiable for the police, acting under routine police procedure, to become bailees of the vehicle.")

CLARK A. CAPLAN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4-86-0501

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

July 1, 1987

Appeal from the Circuit Court
for Broward County;
Mark A. Speiser, Judge

Lane S. Abraham, and Carl
H. Lida of Law Offices of
Carl H. Lida, P.A., Miami,
for appellant.

Robert A. Butterworth, Jr.,
Attorney General, Tallahassee,
and Lee A. Rosenthal and Robert L.
Teitler, Assistant Attorneys
General, and Donna R. Slebodnick,
Legal Intern, West Palm beach,
for Appellee

STONE, J.

The defendant entered a plea of nolo contendere to charges of possession of cocaine and cannabis, reserving the right

to appeal the denial of a motion to suppress. We affirm.

The defendant was involved in an automobile accident in front of a police station. The investigating officer first ascertained that there were no injuries, and examined defendant's license and registration. The vehicle could not be driven, and defendant requested the the officer call a towing service. After calling for the wrecker, the officer proceeded, in accordance with routine police procedure, to fill out a tow slip. Incident to doing this, he checked the automobile VIN inside the vehicle. As appellant was not the registered owner, this was standard procedure. The normal towing procedure also required that an inventory of the car be made as part of the required documentation.

Before entering the car, the officer

noticed marijuana "joints", (handrolled marijuana cigarettes), on the floor board. The defendant was not present, having left the scene to use a telephone. Upon opening the car door, the officer smelled marijuana smoke. The officer had had extensive training and experience in drug identification. A search of the vehicle also uncovered cocaine as well as marijuana.

There are two bases justifying this search and seizure. First, taking into consideration the totality of the circumstances and the training and experience of the officer, there was sufficient cause to justify the conclusion that the vehicle contained contraband. See P.L.R. v. State, 455 So.2d 363 (Fla. 1984), cert. denied, 469 U.S. 1220, 105 S.Ct. 1206, 84 L.Ed.2d 349 (1985); Albo v. State, 379 So.2d 648 (Fla. 1980); Baggett v.

State, 494 So.2d 221 (Fla. 1st DCA 1986); State v. Nobles, 477 So.2d 32 (Fla. 1st DCA 1985), case dismissed, 492 So.2d 1334 (Fla. 1986); State v. Spence, 448 So.2d 599 (Fla. 2d DCA 1984); State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981); Adams v. State, 375 So.2d 638 (Fla. 1st DCA 1979), cert. denied, 385 So.2d 754 (Fla. 1980); State v. Redding, 362 So.2d 170 (Fla. 2d DCA 1978). The right to search in this case is even further reinforced by the fact that the vehicle was about to be removed by the tow truck. See Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). We do not consider Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978), to be controlling.

Second, even had there not been sufficient cause to conduct the search after viewing the marijuana joints, the intrusion for the purpose of taking the

inventory was permissible. The defendant requested the police tow his car from the scene of the accident, and the towing was conducted in accordance with standard police procedures. Under these circumstances, allowing access to the car for the purpose of the taking of an inventory is reasonable. See Colorado v. Bertine, U.S. ___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); United States v. Scott, 665 F.2d 874 (9th Cir. 1981); United States v. Prescott, 599 F.2d 103 (5th Cir. 1979); United States v. Edwards, 577 F.2d 883 (5th Cir.), cert. denied, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); In Re One 1965 Econoline, I.D. No. E16JH702043, Arizona License No. EC-7887, 109 Ariz. 433, 511 P.2d 168 (Ariz. 1973); Miller v. State, 403 So.2d 1307 (Fla. 1981). Although in most

inventory search cases the vehicle has been officially "impounded", we discern no reason for that fact to be a distinguishing feature if the officer's involvement with the vehicle is within the lawful performance of his duties, and otherwise reasonable in capacity of a good faith caretaking function.

We further note that there was more than ample reason for the officer to enter the vehicle for the purpose of inspecting the VIN: the car had been in an accident, was about to be towed, and the driver had no registration. Such an entry is not a search within the Fourth Amendment restrictions. New York v. Class, U.S. ___, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); State v. Ramer, 501 So.2d 52 (Fla. 4th DCA 1987); State v. Eaton, 498 So.2d 1066 (Fla. 4th DCA 1986). In any event, upon legally entering the car and smelling

the odor of marijuana, coupled with the viewing of the marijuana "joints", the officer had sufficient cause for the ensuing search, without regard to whether it was reasonable to take the inventory. See Ensor v. State, 403 So.2d 349 (Fla. 1981).

DELL, J., concurs.
GLICKSTEIN, J., dissents with opinion

GLICKSTEIN, J., dissenting.

The issues are:

I. Whether the trial court erred in holding that under the plain view doctrine there was probable cause to search the vehicle. This writer believes it did.

II. Whether the trial court erred in holding that the inventory search of the vehicle was proper. This writer believes it did.

I

Appellant contends that the information available to Officer Roberts before he conducted his search inside the vehicle did not establish probable cause for him to believe a crime had been committed or was in progress. I agree. A major authority on which he relies is Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978). There the appellant was approached late one evening and questioned, while outside his vehicle, concerning his presence in a certain residential area. He explained why he was there and gave the officer proper identification as requested. The officer then shined his flashlight into the vehicle "to check the interior," and observed therein two hand rolled cigarettes. The officer entered the vehicle, seized and examined the cigarettes and determined they appeared to contain marijuana. The officer arrested

Carr for misdemeanor possession of marijuana. Then he reached back into the vehicle and searched a folded blanket, finding what appeared to be "two lids of marijuana" and a rolling device. Carr was then arrested for felony possession of paraphernalia. The officer together with another then searched the truck further and found additional contraband.

At the hearing on suppression the officer said when he saw the two cigarettes through the window he "knew" they were marijuana because they were unevenly rolled and the ends were twisted. He could not see any marijuana. The appellate court reversed the trial court's finding that the seizure of the marijuana cigarettes was proper and said that absent a search warrant, the search and seizure had to be within a recognized exception to the warrant requirement, the court finding no

applicable exception. The officer had no probable cause to arrest, as the state argued, and could not validly search on that basis. The Carr court quoted the opinion in Dixon v. State, 343 So.2d 1345 (Fla. 2d DCA 1975), for the test to determine probable cause. That test is 'whether the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." 353 So.2d at 959, quoting Dixon. The officer's known facts in Carr failed to meet this standard.

The state argued further, in Carr, that the plain view exception applied. The appellate court said it did not, as all that was in plain view were two cigarettes, not contraband. Id. Both the seizure of the cigarettes and the subsequent search

and seizure were therefore unreasonable and should have been suppressed.

If the sole basis for the search and seizure was the plain view doctrine, I believe it was improper, and pursuant to Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the evidence that resulted should have been suppressed.

II.

The second ground stated by the trial court for denying appellant's motion to suppress - in fact, when stated orally its primary ground - was that the search which revealed the presence of contraband was a proper inventory search. Appellant argues that the inventory search could not be proper when there was no impoundment of the vehicle, and alternatively, if the vehicle was properly impounded, the officer did not advise appellant of reasonable alternatives

to impoundment.

The state argues that there was no impoundment nor intention to impound; that the officer made the inventory search primarily for the benefit of appellant; that impoundment is not a necessary condition of such inventory searches; and that since there was no impoundment, there was no need to tell appellant of available alternatives thereto.

The parties, purusant to our request after oral argument, filed supplemental briefs upon the question whether impoundment was a prerequisite to a valid inventory search. That question was not answered, in my view, by Miller v. State, 403 So.2d 1307 (Fla. 1981).

I would find as follows:

1. There was no official impoundment here; but such was unnecessary if the inventory search was otherwise defensible.

2. There was no right nor duty on the officer's part to conduct an inventory search in this case.

With respect to the first conclusion, in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the court stated that "[i]n applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents", 96 S.Ct. at 3099, 49 L.Ed.2d at 1007 (emphasis added). See also State v. Floyd, 120 Ariz. 358, 586 P.2d 203, 206 (Ct. App. 1978); Robertson v. State, 541 S.W.2d 608 (Tex. Ct. App. 1976); United States v. Feldman, 788 F.2d 544, 552 n.10, (9th Cir. 1986).

However, I believe the "inventory

search" in the present case was a violation of Caplan's constitutional right to protection from unreasonable search and seizure. It is true, as the state points out, that appellant gave his authorization and consent to have the vehicle towed by the tower that usually tows vehicles for the police. I assume it is also true that the police routinely search vehicles towed under their auspices - though it may well be this is only because usually the vehicles are also being impounded, and consideration has not been given to a distinction from other circumstances. It may also be inferred that Caplan requested the policeman to call for the wrecker because (1) the policeman made clear the tow had to be prompt because the intersection was a busy one, (2) Caplan was rattled because of the accident, and (3) Caplan had no reason to suppose the police

would go through the contents of his automobile.

Nevertheless, the officer did not advise appellant of reasonable alternatives to the "impoundment." Appellant merely requested that the officer call a tow truck. Appellant was not arrested nor otherwise unable to make a decision regarding any valuables in the automobile. See e.g. Altman v. State, 335 So.2d 626, 628-29 (Fla. 2d DCA 1976) (In considering the validity vel non of an inventory search, it becomes essential to determine initially whether it is necessary for police to conduct the search. "A prime criterion to determine if police have taken lawful custody is whether or not it is justifiable for the police, acting under routine police procedure, to become bailees of the vehicle.")

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, FLORIDA

CASE NO: 85-11854 CF

JUDGE: MARK A.
SPEISER

STATE OF FLORIDA, :

Plaintiff, :

vs. : ORDER DENYING
: MOTION TO SUPRRESS

CLARK ALLEN CAPLAN,

Defendant. :

This Court sitting as the trier of fact[1] having heard the testimony of the witnesses and argument of counsel, enters the following findings of fact and conclusions of law:

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[1] State v. Nova, 361 So.2d 411 (Fla. 1978).

FINDINGS OF FACTS

1. Mr. Caplan requested Officer Roberts call a towing service to tow the vehicle in question.
2. At the time Officer Roberts observed the burnt cigarette ends he was outside the vehicle in question and in a place where he had a legal right to be.

CONCLUSIONS OF LAW

1. Officer Roberts was authorized to inventory the vehicle in question upon Mr. Caplan leaving the vehicle in his custody.
2. Officer Roberts' observation of the burnt cigarette ends authorized him to open the door to the vehicle to determine if a crime was being

committed.[2]

WHEREFORE, it is considered ORDERED AND ADJUDGED that the Motion to Suppress be in the same is hereby DENIED.

DONE AND ORDERED in Fort Lauderdale, Broward County, Florida, this 7 day of March, 1986. NUNC PRO TUNC to February 28, 1986.

/s/ MARK A. SPEISER

HONORABLE MARK A. SPEISER
Judge of the Circuit Court

Copies to:

Counsel of record

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[2] State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981); Adams v. State, 375 So.2d 638 (Fla. 1st DCA 1979); State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978); Tamburro v. State, 343 So.2d 638 (Fla. 4th DCA 1977).